Supreme Court, U. S.
FILED
JUL 24 1975
MICHAEL RODAK, JR., CLERK

THE

Supreme Court of the United States

October Term, 1975

No. 74-1610

RICHARD H. OLSEN,

Petitioner.

vs.

SAUL GOODMAN,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

LAW OFFICES OF
LEO GREENFIELD, P.A.
Attorney for Respondent
1680 N.E. 135th Street
North Miami, Florida 33181

FLORIDA FINANCIAL PRINTING, INC. 758-1782

TABLE OF CONTENTS

Page

INTRODUCTION 2
JURISDICTION 4
QUESTIONS PRESENTED 5
STATEMENT 6
REASONS FOR NOT GRANTING THE WRIT 15
CONCLUSION 32
APPENDIX A-1

CITATIONS

Cases: *Page Nos.*

Allen v. Allegheny Co., 196 U.S. 458, 49 L. Ed. 551, 25 S. Ct. 311 31
Awotin v. Atlas Exchange National Bank 295 U.S. 209, 79 L. Ed. 1393, 55 S. Ct. 674 20
Banholzer v. New York Life Insurance Co. 178 U.S. 402, 44 L. Ed. 1124, 20 S. Ct. 972 30,31
Brinkerhoff-Faris Trust and Savings Co. v. Hill 281 U.S. 673, 74 L. Ed. 1107, 50 S. Ct. 451 23
Coe v. Armour Fertilizer Works, 237 U.S. 413, 59 L. Ed. 1027, 35 S. Ct. 625 16
Cusick v. Ifshin, 334 N.Y.S. 2d 106, 70 Misc. 2d 564, Aff'd. 341 N.Y.S. 2d 280 (Sup. Ct. App. Term, 1973) 27
De Saussure v. Gaillard, 127 U.S. 216, 32 L. Ed. 125, 8 S. Ct. 1053 21
The Florida Bar v. Pitts, 219 So. 2d 427 ... 22,23
Glenn v. Garth, 147 U.S. 360, 37 L. Ed. 203, 13 S. Ct. 350 29,30

Cases: *Page Nos.*

Gospel Army v. Los Angeles, 331 U.S. 543, 91 L. Ed. 1662, 67 S. Ct. 1428 16,17
Gulf Refining Co. v. U.S., 269 U.S. 125, 70 L. Ed. 195, 46 S. Ct. 52 16
Hanson v. Denckla, 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 19
Johnson v. New York Life Insurance Co., 187 U.S. 491, 47 L. Ed. 273, 23 S. Ct. 194 29
Kipley v. Illinois, 170 U.S. 182, 42 L. Ed. 998, 18 S. Ct. 550 20
Lloyd v. Matthews, 155 U.S. 222, 39 L. Ed. 128, 15 S. Ct. 70 31
North Dakota Pharmacy Board v. Snyder Stores, 414 U.S. 156, 38 L. Ed. 2d 379, 94 S. Ct. 407 16
Orvis v. Curtiss, 157 N.Y. 655 (1899) 27
Patterson v. Colorado, 205 U.S. 454, 51 L. Ed. 879, 27 S. Ct. 556 24
Radio Station WOW v. Johnson, 326 U.S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475 17
Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506, 82 L. Ed. 392, 58 S. Ct. 295 21
Scott v. Booth, 253 U.S. 475, 64 L. Ed. 1020, 40 S. Ct. 484 16
Solesbee v. Balkcom, 339 U.S. 9, 94 L. Ed. 604, 70 S. Ct. 457 20
Southern Pacific v. Gileo, 351 U.S. 493, 100 L. Ed. 1375, 76 S. Ct. 952 18
Speiser v. Randall, 357 U.S. 513, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 24

Cases: *Page Nos.*

Standard-Vacuum Oil Co. v. U.S., 339 U.S. 157, 94 L. Ed. 731, 70 S. Ct. 545 20
State of Florida ex rel. The Florida Bar v. Delves 160 So. 2d 114 22,23
Street v. New York, 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 19
Urie v. Thompson, 337 U.S. 163, 93 L. Ed. 1282, 69 S. Ct. 1018, 11 A.L.R. 2d 252 16
West v. Louisiana 194 U.S. 258, 48 L. Ed. 965, 24 S. Ct. 650 24

Authority: *Page Nos.*

74 A.L.R. 716 29

Rules:

Supreme Court Rule 40 2
Supreme Court Rule 23(1) (f) 20
Title 28, United States Code 7
Title 28, United States Code, Section 2101(c) 4
Title 28, United States Code, Section 1257 15,17,18

Constitution:

United States Constitution
Article One 6
Article Four 6
Article Seven 6
Article Fourteen 6

State of Florida Constitution
Article V Section 3(b) (3) 5,9,21

THE

Supreme Court of the United States

October Term, 1975

No.

RICHARD H. OLSEN,

Petitioner,

vs.

SAUL GOODMAN,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Respondent prays that the Petition for Writ of Certiorari to review the Judgment of the Supreme Court of Florida entered on the 7th day of November, 1974, and an Order Denying Petition for Rehearing on January 29, 1975, be denied, and that said Petition for Writ of Certiorari be dismissed, forthwith.

INTRODUCTION

Respondent, being dissatisfied with the presentation by the Petitioner due to inaccuracies or omissions, has deemed it necessary to restate, pursuant to the provisions of Rule 40, portions of Petitioner's Petition for Writ of Certiorari, identified as:

OPINIONS BELOW;
JURISDICTION;
THE QUESTIONS PRESENTED; and
THE STATEMENT OF THE CASE.

Additionally, the Petition contains certain irrelevant, immaterial and scandalous matter, *de hors* the record, impugning the integrity of the Supreme Court of Florida.

For the foregoing reason, as well as others herein demonstrated, the Petition should be disregarded and stricken by the Court.

The most flagrant of the material, *de hors* the record, is the Affidavit of Marc H. Glick, a Staff Committee Investigator in recent Legislative Impeachment Committee hearings in Florida, which is intended to indicate irregularity in the assignment of cases in the Florida Supreme Court, and inferring that the same may have happened in the instant cause. As pointed out, inasmuch as the Petition is, in good part, based on materials, *de hors* the record, it should be stricken forthwith. Nevertheless, in the interests of justice, and in order that this Honorable Court may be advised as to the full truth of the testimony of Mr. Ragano before Mr. Glick, instead of a distorted version thereof contained

in Mr. Glick's Affidavit, the Affidavit of Frank Ragano, *de hors* the record, in response to and in clarification of, the Affidavit of Marc H. Glick, is printed herein as Appendix "E". Respondent submits to the Court that both Affidavits should be stricken by the Court, as well as the Petition herein; but in the interests of justice, provides the same in support of the integrity of the Supreme Court of Florida. Within the framework of the instant cause, there is no one save the Respondent to speak in support of the Highest Court of our State, and Respondent accepts the honor.

OPINIONS BELOW

In addition to the opinions appended to the Petition herein, Respondent has appended the Order of the Supreme Court of Florida, printed as Appendix "B" hereto, dated June 24, 1974, granting conditional Writ of Certiorari.

Additionally, the Opinion of the Supreme Court of Florida, dated November 7, 1974, on the merits of the cause after granting certiorari, reversing the District Court of Appeal of Florida, Third District, reported at 305 So.2d 753, is printed as Appendix "C" hereto. This Opinion is appended to the Petition herein; but inasmuch as the contents thereof are frequently referred to in this Brief, it is printed for the Court's easy literary reference.

JURISDICTION

Petitioner invokes jurisdiction of this Court under Title 28, United States Code, Section 2101(c). Said Section contains no matters which pertain to the jurisdiction of this Court or the grounds upon which it may be invoked; and consequently, no fair claim for the invoking of jurisdiction is presented to this Honorable Court. Respondent is not fairly advised under what provision of the United States Code jurisdiction is claimed for this Petition, and must contest jurisdiction on all grounds. Certainly, the provisions of Title 28, United States Code, Section 2101(c), confer no jurisdiction on this Court to review the Judgment in question by Writ of Certiorari.

Jurisdiction of this Court herein is denied on a variety of grounds set forth in detail in the Argument portion of this Brief, entitled "REASONS FOR NOT GRANTING THE WRIT".

A capsulization thereof, at this juncture, would be useful to the Court.

A. The Judgment of the Supreme Court of Florida, entered on November 7, 1974, sought to be herein reviewed, was not a Final Judgment, and remanded the cause to the Circuit Court of Dade County, Florida, for trial.

B. No substantial Federal question is raised by the Petition.

C. The conflicts now claimed by the Petitioner with the Constitution of the United States were never

raised in any stage of the Florida proceedings, including the Petition for Rehearing before the Supreme Court of Florida, denied on January 29, 1975, and are raised for the first time in this Petition.

D. The Petition is based on matters, *de hors* the record, before the Supreme Court of Florida, and thus should not be considered.

E. The Petition is replete with irrelevant, immaterial and scandalous matter, *de hors* the record, impugning the integrity of the Supreme Court of Florida. The Petition should thus be stricken.

QUESTIONS PRESENTED

The questions presented by Petitioner herein raise no substantial Federal question. The questions, as presented by the Petitioner, will be discussed, *infra*, in detail, in the Argument Section of this Brief, but the Response thereto can be capsulized for the easy reference of the Court, as follows:

1. Petitioner disagrees with the Decision of the Supreme Court of Florida, assuming jurisdiction of your Respondent's Petition for Writ of Certiorari, under Article V, Section 3(b)(3), of the Constitution of the State of Florida, and contends that no conflict jurisdiction existed, and that the Supreme Court of Florida's Decision denies Petitioner due process. The construction of the State's own Constitution by its Supreme Court is uniquely within the province of that State's Supreme Court, and will be recognized and followed by the Supreme Court of the United States, and raises no substantial Federal grounds for invoking certiorari.

2. The second question raised by Petitioner claims, by reason of the Decision of the Supreme Court of Florida in the instant cause, conflict with Articles I, IV, VII and XIV of the Constitution of the United States. In essence, however, this question contends that the Supreme Court of Florida failed to give full satisfaction and credit to the Statutes of New York, and the Decisions of New York Courts on usury and on contracts. The opinion of the Supreme Court of Florida, entered on November 7, 1974, in and of itself, shows clearly that that Court did indeed give full faith and credit to the laws of New York concerning usury and contracts, but simply applied the New York law governing usury and contract in a manner of which the Petitioner disapproves and finds erroneous. In short, it is the construction of the New York law by the Supreme Court of Florida, of which the Respondent really complains, and which Petitioner attempts to clothe in a Federal jacket. Whether or not the construction of the New York usury law by the Supreme Court of Florida in the case at bar was or was not correct; it did, in fact, give full faith and credit not just to the Statutes, but to the judicial decisions of that State; and thus, no grounds exist for invoking the jurisdiction of this Court for certiorari.

STATEMENT

I. NATURE OF THE CASE

This Petition arises from an Order of the Supreme Court of Florida of November 7, 1974, granting Petition for Certiorari to Saul Goodman, reversing an Affirmance by the District Court of Appeal of Florida, Third District, which affirmed a Judgment of the Circuit

Court of Dade County, Florida, in favor of the Petitioner, Richard H. Olsen, and remanding the cause for a new trial. The aforesaid Order of the Supreme Court of Florida of November 7, 1974, does not constitute a "Final Judgment", which, under Title 28, United States Code, may be reviewed by the Supreme Court of the United States by Writ of Certiorari.

II. PERSONS INVOLVED

THE PETITIONER: Richard H. Olsen, is a member of the Florida Bar since 1957, a specialist in corporate acquisitions, both in New York and Florida, and an investor in numerous corporate stock acquisitions with special expertise therein. Since 1960, Olsen and the Respondent, Saul Goodman, a much older man, had a continuing quite close social friendship. Although Olsen never professionally represented Goodman, he did, over the course of years, give Goodman various legal opinions. Their relationship was quite close, and Goodman relied on him.

THE RESPONDENT: Saul Goodman, is sixty-seven (67) years old, a businessman long since retired (1958), unmarried and alone. Formerly, Goodman was an occasional investor who had several transactions with Olsen in the past.

III. THE CASE

This cause involved an action at law on a joint venture pursuant to a contract, hand-written by Olsen, an attorney, and dated September 17, 1968 (APP.A). Under the terms of the joint venture, Goodman (Plaintiff below and Respondent here), advanced the sum of

$300,000.00 for the purchase of 50,000 shares of Omega Equities, Inc. common stock under an investment letter. Of the $300,000.00 advanced by Goodman under the joint venture, $150,000.00 was a loan to Olsen with which he was to purchase 25,000 shares of the 50,000 shares to be purchased. Goodman would purchase the other 25,000 shares with the remaining $150,000.00 of the funds being advanced.

The contract written by Olsen further provided that Olsen would repay the $150,000.00 on or before May 31, 1969, *with no interest*. Olsen further agreed that if Goodman wished to sell his 25,000 shares between October 1, 1969, and December 31, 1969, that Olsen would repurchase the same for $10.00 per share. Thereafter, Goodman delivered a check to Olsen for $300,000.00, which was subsequently delivered to Omega in exchange for the purchase of the stock in question.

After maturity of the note, Olsen repaid $60,000.00 of the $150,000.00 loan, but failed to make further payments. As a result, Goodman filed suit in the Circuit Court of Dade County, Florida, for repayment of the balance due, and for damages incurred by Goodman when Olsen failed to comply with the terms of the contract and declined to buy back the stock from Goodman. The principal defense interposed by Olsen was that the contract was usurious under the Laws of the State of New York, and unenforceable. Olsen made this contention, although he, himself an attorney, had drawn the agreement and had obtained as a result thereof, $150,000.00 from Goodman, his old friend, a non-attorney, who had relied upon him. It was conceded by the parties that the transaction occurred in New York, and that New York Law should apply.

After a two (2) day trial, a verdict in favor of Olsen resulted, which was followed by a Judgment thereon.

Goodman appealed to the District Court of Appeal of Florida, Third District, but the Appeal was dismissed for failure to timely file a Brief by his then counsel.

Goodman's appeal was reinstated when the Supreme Court of Florida granted a Writ of Certiorari, and remanded the cause to the District Court of Appeal of Florida, Third District, to be heard on its merits. Said District Court of Appeal of Florida, Third District, subsequently affirmed the Trial Court Judgment in favor of Olsen.

Goodman again sought certiorari from the Supreme Court of Florida pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida on a claim of jurisdictional conflict between Decisions of the Supreme Court and other District Courts of Appeal of Florida, and the Per Curiam Decision of the District Court of Appeal of Florida, Third District in the case at bar.

On June 24, 1974, the Supreme Court accepted jurisdiction of the cause and directed the parties to file Briefs on the merits of the cause.

No portion of the conditional Writ of Certiorari discussed or set forth the Court's reasoning in connection with the conflict in question, and allegations of the Petition and his Petition as to the Court's reasoning in this regard are but the purest speculation by Petitioner.

Because of efforts made throughout this Petition to cast aspersions on the integrity of the Supreme Court of

Florida, totally unsupported by the Record, it is necessary to set forth as to the Decisions of the Supreme Court of Florida herein involved, the names of the Justices, concurring and dissenting.

The Supreme Court of Florida accepted conflict jurisdiction of this cause on June 24, 1974, without dissent, contrary to the Petition of Olsen (APP.B). The concurring Justices were Adkins, Chief Justice; Roberts; McCain; Dekle; and Overton. The particular Justices liberally smeared by the Petition herein are Justices McCain, Dekle and Boyd. It should be noted that of the five (5) Justices unanimously voting to conditionally accept jurisdiction, only two (2) participated, whose integrity is contested by Olsen.

Subsequently, the Supreme Court, having granted conditional jurisdiction, entertained the merits of the cause and reversed the District Court of Appeal of Florida, Third District (APP.C).

The cause was remanded to the Circuit Court of Dade County, Florida, for retrial and thus does not constitute a Final Judgment of the Supreme Court of Florida from which, under the Federal Judiciary Code, Petitioner herein may invoke certiorari.

The makeup of the Panel of the Florida Supreme Court which, having accepted certiorari, entertained the merits of the Petition and reversed the cause, and remanded it for new trial, is as follows: Adkins, Chief Justice; Roberts; McCain; Ervin; and Boyd. There was a single dissent by Justice Overton.

It should be observed in defense of the Florida Supreme Court from the aspersions cast upon it by the Petitioner, that of the aforesaid Panel, only Justice McCain has subsequently resigned from that Bench.

Justice Boyd, likewise, liberally smeared in the Petition, was not voted for impeachment by the Select House Committee involved, but was referred to mental examination to the Florida Judicial Qualifications Commission. As a result thereof, he was found fully competent; no charges are lodged against him of any nature; and he is a fully qualified, sitting and unimpeached present member of the Florida Supreme Court.

Thus, of the five (5) Justices who remanded Petitioner's cause for a new trial to the Circuit Court of Dade County, Florida, only one has been caused to resign; to-wit: Justice McCain. There was only one dissent. The foregoing actual head count of the panels of the Supreme Court granting certiorari in this cause and reversing the matter on its merits reveals the immateriality of the portions of this Petition which infer that the reversal of Olsen's case in the Supreme Court of Florida is due to improper motives or lack of integrity of the Florida Supreme Court.

Thereafter, a Petition for rehearing was filed by Olsen, which was denied on January 29, 1975. Olsen's Petition herein, with thundering inaccuracy, alleges that the aforesaid Petition for Rehearing set forth "the denial of due process of law to Olsen by the prohibition of the use of the defense of usury and jury trial, as guaranteed by the Constitution of the State of New York." Actually, no contention of denial of due process of law is made by Olsen in the said Petition for

Rehearing, nor any contention that he has been denied a jury trial, as guaranteed by the Constitution of the State of New York. In order that this Honorable Court can assure itself that this is so, the Petition for Rehearing is appended hereto as APP.D. No question of denial of constitutional rights or the failure to observe full faith and credit, or of any other purported Federal question was ever raised at any phase of the appellate proceedings in Florida, and have never before been stated in this cause, until Petitioner has sought certiorari from this Honorable Court.

On April 10, 1975, Olsen filed a Motion for Extention of Time within which to file his Petition for Writ of Certiorari to this Court, which was granted through June 27, 1975.

At the conclusion of the impeachment hearings referred to in Petitioner's Brief, Justices Dekle and McCain resigned from the Supreme Court. As pointed out, *supra*, Justice Boyd was not recommended for impeachment; was found totally competent physically to serve, and is serving now in fullest capacity as a Justice of the Florida Supreme Court. All of the matters contained in the Petition in connection with the impeachment hearings and the Justices in question are *de hors* the record, and thus have no place in a Petition to this Honorable Court for Writ of Certiorari.

There is absolutely nothing, even in the materials outside the record, presented in Petitioner's Appendix to his Brief which would indicate any irregularity, even in the assignment of the Goodman-Olsen case to Justice McCain, when Goodman's Second Petition for Writ of Certiorari reached the Supreme Court of Florida, Case

No. 45,356, the case which is the subject matter of the Petition now pending before this Honorable Court.

Appendix "G" to Olsen's Petition herein, the Affidavit of Marc H. Glick, upon which Petitioner relies for his claim of irregularity in assignment of the cause in the Florida Supreme Court, points out that he had not even completed his investigation as to how Case No. 45,356 fell before Justice McCain prior to McCain's resignation from the Court.

In lieu of any evidence to the contrary, it must be presumed that Case No. 45,356 was assigned to Justice McCain in normal rotation under the blind filing system. Certainly no evidence appears, even *de hors* the record, and presented by Affidavits contained in the Appendix of the Petitioner, that would indicate otherwise.

It is further contained in said Affidavit that the Clerk of the Supreme Court of Florida, Mr. Sid White, had testified that request for assignment of cases for Justices were uncommon and unusual. Obviously, then, such requests therefor are made and are not, per se, evidence of any improper motive and lack of integrity. Specifically, Mr. White, who made such assignments, did not recall if the Goodman-Olsen case had been requested by McCain.

The Affidavit of Marc H. Glick, para-prosecutor turned advocate in this cause, like a ballerina's tu-tu, conceals more than it reveals.

It refers to the *Lombardosi* case, a criminal matter (in which Mr. Frank Ragano represented the Defendant

convicted in the cause), as if some proof, indication or even substantial inference of wrongdoing was shown, thereby, which would implicate former Justice McCain and Mr. Ragano. Actually, no irregularity of any type was shown; and as Mr. Ragano's Affidavit (APP. "E") reveals, he testified under oath to Mr. Glick that he actually met Justice McCain for the first time in the Florida Supreme Court Building, in Tallahassee, Florida, approximately one year subsequent to the incident described by Glick in his Affidavit regarding the *Lombardosi* case. Ragano testified under oath that he had not, at any time, spoken to McCain or any other of the Supreme Court Justices of Florida regarding either the instant cause or the *Lombardosi* case.

Mr. Ragano is a criminal lawyer, who had three (3) criminal matters on appeal before the Supreme Court of Florida while Justice McCain was on that Bench. Those three (3) include *Lombardosi.* In each cause, the Supreme Court of Florida affirmed Trial Court convictions, and Ragano's three (3) criminal clients are presently serving prison terms of life, twenty (20) years, and twelve (12) years, respectively. While Justice McCain was on the Bench of the Florida Supreme Court, Mr. Ragano has lost all three (3) criminal appeals which he had taken to the Supreme Court of Florida. If there is some conspiratorial significance, as inferred by Mr. Glick and the Petitioner herein by reason of the fact that Justice McCain was on the Bench of the Florida Supreme Court during the time that Mr. Ragano appealed three (3) criminal matters to that Court, the significance is decidedly lost on Mr. Lombardosi and the two (2) other clients of Mr. Ragano now serving life, twenty (20) years, and twelve (12) years, in the Florida Prison System.

Mr. Glick's Affidavit does not reveal the foregoing, nor does it reveal that Mr. Ragano volunteered to testify before the Select House Impeachment Committee; but for the obvious reasons hereinabove set forth, Mr. Glick did not desire to present him as a witness, and excused him.

In the face of such testimony, any contention of irregularity in the handling of the cause at bar by the Florida Supreme Court or any further impugning of the motives and integrity of that body are patently absurd.

REASONS FOR NOT GRANTING WRIT

Title 28, U.S. Code, Section 1257, provides as pertinent hereto, as follows:

> "Sec. 1257 — STATE COURT; APPEALS; CERTIORARI — Final Judgments or Decrees rendered by the highest court of a State in which a Decision could be had, may be reviewed by the Supreme Court as follows . . ."

The language of the above-quoted pertinent Statute is crystal clear that this Honorable Court will review by certiorari as pertinent to the instant cause, only a Final Judgment of the highest court of Florida. The language speaks for itself, but has been highlighted and underlined many times by the Decisions of this Honorable Court.

In the case at bar, the Supreme Court of Florida reversed the District Court of Appeal of Florida, Third District, and remanded the cause for a new trial by jury (APP. C).

As a general rule, Judgment of the highest court of a State, reversing an inferior Court and remanding the case to the Lower Court for new trial, is not a Final Judgment, and hence, is not reviewable by the Supreme Court of the United States. *Urie vs. Thompson,* 337 U.S.163, 93 L.Ed.1282, 69 S.Ct.1018, 11 A.L.R.2d 252; *Gulf Refining Co. vs. U.S.,* 269 U.S.125, 70 L.Ed.195, 46 S.Ct.52; *Scott vs. Booth,* 253 U.S.475, 64 L.Ed.1020, 40 S.Ct.484; *Coe vs. Armour Fertilizer Works,* 237 U.S.413, 59 L.Ed.1027, 35 S.Ct. 625.

Case law is clear that, in general, the finality of a State Appellate Court's reversal of a Lower Court depends upon whether under State Law the effect of the reversal is to grant a new trial.

In *Gospel Army vs. Los Angeles,* 331 U.S.543, 91 L.Ed.1662, 67 S.Ct.1428, it was held that an unqualified reversal by a State Court is not a Final Judgment, for purposes of review by the Supreme Court of the United States, where the reversal operates to remand the case for a new trial.

The foregoing basic propositions of law which are applicable hereto, show that without question the language of the opinion of the Supreme Court of Florida in the cause at bar, remanding this cause for a new trial renders the reversal and the decision not a "Final Judgment" for purposes of Court review.

As this Court said in *North Dakota Pharmacy Board vs. Snyder Stores,* 414 U.S.156, 38 L.Ed.2d 379, 94 S.Ct.407:

> "(2) The finality requirement of 28 U.S.C., Sec.1257 (28 U.S.C.S., Sec.1257) which limits our review of state court judgments, serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs."

As Mr. Justice Frankfurter stated in *Radio Station WOW vs. Johnson,* 326 U.S.120; 89 L.Ed.2092, 65 S.Ct.1475:

> ". . . And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation (414 U.S.160) only after 'the highest court of a State in which a decision in the suit could be had' has rendered a 'final judgment or decree'. Sec. 237 of the Judicial Code, 28 U.S.C., Sec. 344(a) (28 U.S.C.S., Sec.344(a)). This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system."

As pointed out in *Gospel Army, supra,* a Judgment of an Appellate Court, to be final and reviewable under this Title, must end the litigation by fully determining the rights of the parties so that nothing remains to be done by the Trial Court, except the ministerial act of entering Judgment, which the Appellate Court directed. In that case, the Judgment reversed by the

California Supreme Court had the effect, under State practice, of remanding the case for new trial. The rationale of the case conclusively applies to the cause at bar. A host of additional decisions are all to the same effect, and have been cited, supra. A typical cause whose decision is precedent for the denial of certiorari herein is *Southern Pacific vs. Gileo,* 351 U.S.493, 100 L.Ed.1375, 76 S.Ct.952. In that case where the California Supreme Court reversed decisions of Lower California Courts and remanded cases for trial on the issues of negligence and damages, the Supreme Court of the United States held that there was no "Final Judgment" of the highest court of a State, within the meaning of the Title in question; and, therefore, the United States Supreme Court lacked jurisdiction to review.

There can be little question that in view of these authorities and the specific language of 28 U.S.C., Section 1257, no jurisdiction for review is indicated herein.

As additional grounds for rejecting this Petition, it should be stated that the non-substantial Federal questions which are allegedly raised in this Petition, are raised by Petitioner for the first time in this Honorable Court, and have never been raised in any Florida proceedings, including the Petition for Rehearing before the Florida Supreme Court as to that Court's Order of reversal and remand for trial of November 7, 1974. The Court's attention is invited to the contents of the aforesaid Petition for Rehearing, which is printed in Appendix "D" herein. This Honorable Court has long since determined that it will not, in reviewing a Judgment of the highest court of a State, determine alleged Federal questions which were not seasonably presented to the State Court below.

In *Hanson vs. Denckla,* 357 U.S.235, 2 L.Ed.2d 1283, 78 S.Ct.1228, the question arose as to whether the Supreme Court of Florida was required to give full faith and credit to a decision of a Delaware Court which was raised for the first time before the Florida Supreme Court on Motion for Rehearing. This Honorable Court, in refusing to make such a determination, stated:

> "We need not determine whether Florida was bound to give full faith and credit to the Decree of the Delaware Chancellor, since the question was not seasonably presented to the Florida Court. Radio Station WOW vs. Johnson, 326 U.S.120, 89 L.Ed.2092, 65 S.Ct. 1475."

It is to be noted that at least in *Hanson,* the alleged Federal question was raised on Petition for Rehearing to the Supreme Court of Florida, whereas in the instant cause, no Federal question has been raised until the filing of this Petition. As pointed out in *Street vs. New York,* 394 U.S.576, 22 L.Ed.2d 572, 89 S.Ct.1354, if an issue, allegedly Federal, was not presented to the State Court in such a manner to be necessarily decided by the highest State Court, then the Supreme Court of the United States would have no power to consider the issue.

The foregoing rule is particularly applicable in the case, *sub judice,* where Petitioner bases a considerable portion of his application on Affidavits and matters, *de hors* the record, in addition to raising the points claimed for the first time herein. This Honorable Court will not review questions not timely raised and not clearly raised on the record; and in accordance with its own

established policy, will not go beyond constitutional or Federal issues not necessarily raised by the record. *Standard-Vacuum Oil Co. vs. U.S.*, 339 U.S.157, 94 L.Ed.731, 70 S.Ct.545; *Solesbee vs. Balkcom*, 339 U.S.9, 94 L.Ed.604, 70 S.Ct.457.

Jurisdiction of the Supreme Court of the United States on certiorari cannot be founded on surmise as to what, if any, Federal question the State Court rested its Opinion and Decision upon, nor can a claim or jurisdiction be sustained by reference to statements which are not a part of the record. This principle of law has long since been established by this Court, together with the proposition that this Court will not resort to forced inferences and conjectural reasonings or to possible suppositions as to points raised and decided by the State Court. *Awotin vs. Atlas Exchange National Bank*, 295 U.S.209, 79 L.Ed.1393, 55 S.Ct.674; *Kipley vs. Illinois*, 170 U.S.182, 42 L.Ed.998, 18 S.Ct.550. The rules of the Supreme Court of the United States itself, provide that the jurisdictional statement required to be set forth in Petitions for Certiorari must contain such pertinent matter *from the record* as will support the assertion that the State Court's Rulings are of such a nature as to bring the case within the statutory provision asserted to confer jurisdiction on the Supreme Court (S.Ct.Rule 23(1) (f)).

Accordingly, in the instant cause, without even considering what Petitioner contends are the merits of his Petition, the failure of the Petitioner to timely raise a Federal question before the Florida Courts, as well as his reliance on matters, *de hors* the record, to now claim a Federal ground, are valid and basic reasons for denial of this Petition. Petitioner has raised what he purports to be Federal questions too late and improperly.

As pointed out herein, multiple grounds exist for the denial of jurisdiction by this Court to entertain this Petition for Certiorari. Certainly, foremost among them are the facts that neither of the two (2) Questions Presented by Petitioner herein raise a substantial Federal question.

As to Question No. 1, Petitioner disagrees with the decision of the Supreme Court of Florida assuming jurisdiction of your Respondent's Petition for Writ of Certiorari, in that he contends that no conflict jurisdiction existed under Article V, Section 3(b)(3) of the Constitution of the State of Florida, and that the decision of the Supreme Court of Florida denies Petitioner due process. As pointed out, *supra*, this question is raised for the first time herein. It was not presented to the Supreme Court of Florida, even in Petitioner's Petition for Rehearing.

This Honorable Court has stated many times, and established as a solid proposition of law, that it will not review a Judgment of a State Court where the contention is that the State Court exceeded its powers under the State Constitution. A review is precluded if the decision of the State Court is upon a point of local or general law sufficient to support the Judgment. This rule is not altered by the fact that the Supreme Court may consider the position of the State Court in the non-federal or local matter as an unsound one. *Schuylkill Trust Co. vs. Pennsylvania*, 302 U.S.506, 82 L.Ed.392, 58 S.Ct.295; *DeSaussure vs. Gaillard*, 127 U.S.216, 32 L.Ed.125, 8 S.Ct.1053.

Petitioner is asking this Honorable Court to review the Judgment of the Florida Supreme Court construct-

ing its own State Constitution; and this, as the foregoing citations and many more indicate, this Court has pre-emptorily stated it will not do.

Lower Courts in Florida rejected the principle that on the facts of the case at bar, the Petitioner herein was estopped to claim usury as a defense. The facts elicited at trial were that the Petitioner, an attorney who had borrowed money from the Respondent, a layman, drew up the contract and note in question, failed to pay the obligation, and then claimed usury as a defense to litigation on the note. Respondent contended before the Supreme Court of Florida that the principles of law inherent in the rationale of the Supreme Court of Florida in *State of Florida, ex rel. The Florida Bar vs. Delves,* 160 So.2d 114, and *The Florida Bar vs. Pitts,* 219 So.2d 427, were in direct conflict with the principles of law set forth on the facts of the case at bar by the District Court of Appeal of Florida, Third District.

The Florida Lower Courts had rejected the principles claimed by your Respondent herein that Petitioner herein was estopped to claim usury as a defense, in this litigation.

In *Delves,* as in the case at bar, Delves, a Florida attorney, had borrowed substantial funds from two (2) laymen, had closed the loan transaction, and had himself drawn the promissory note in question. When suit was filed by the laymen to enforce the loan, Delves raised the defense of usury. The Supreme Court of Florida in *Delves* had increased the punishment of reprimand ordered by The Florida Bar to a twelve (12) month suspension. The Court said:

> "The furnishing of this defective instrument to a layman under these circumstances, and the subsequent public oath to the validity of his defense to the action on the note was contrary to honesty and justice, and not in keeping with the high standards of the legal profession. Such conduct on the part of a member of the Bar can only bring discredit upon the entire profession."

Inherent in the principles of law laid down by the Supreme Court of Florida in *Delves,* affirmed in *Pitts* on very similar facts, and inherent in its rationale, is the principle that in civil litigation such as the case at bar, an Attorney-Defendant being sued on a note which he, himself, had drawn, would be estopped to claim usury as a matter of law.

Certainly the principles of law inherent in the rationale of the Supreme Court of Florida in *Delves* and in *Pitts* do indeed directly conflict with the principles of law set forth as to estoppel to claim usury by the Lower Courts in Florida in this cause. The Order of the Florida Supreme Court of November 7, 1974, granting conditional certiorari, gives no opinion as a guideline to its decision; however, as pointed out, *supra;* whether or not this Honorable Court would agree or disagree and find erroneous the decision of the Supreme Court of Florida in granting jurisdiction, its own precedents clearly establish that it will not review a Judgment of a State Court where the contention is, as it is in this case, that the Supreme Court exceeded its powers under the State Constitution or made an erroneous decision as to the effect of its State Constitution. As this Court pointed out in *Brinkerhoff-Faris Trust and Savings Co. vs. Hill,*

281 U.S.673, 74 L.Ed.1107, 50 S.Ct.451, that a State Court rendered an erroneous decision on a question of State Law or overruled principles established by previous decisions on which the parties to the litigation relied, does not confer appellate jurisdiction on the United States Supreme Court. State Courts have supreme power to interpret the written and the unwritten laws of their State.

Merely because a decision of a State Court is asserted to be wrong, and because of its erroneous nature, of violating the Federal Constitution, does not confer Federal appellate jurisdiction. *Patterson vs. Colorado,* 205 U.S.454, 51 L.Ed.879, 27 S.Ct.556.

This Honorable Court has stated firmly and consistently that it must accept the construction of the highest court of a State of its own Constitution, and of its Statutes, and that the construction of same is the exclusive responsibility of State Courts. *Speiser vs. Randall,* 357 U.S.513, 2 L.Ed.2d 1460, 78 St.Ct.1332.

This Honorable Court laid the question to rest with finality in *West vs. Louisiana,* 194 U.S.258, 48 L.Ed.965, 24 S.Ct.650, when it said:

> "Whether the State Court erred in its construction of the State Constitution and Statutes . . . is not a Federal question."

The foregoing exposition of the law applicable makes it clear that the decision in the instant case of the Supreme Court of Florida, in interpreting its own Constitution, and to grant conflict certiorari is peculiarly within the province of the highest court of

the State of Florida, and its construction accordingly will be followed by Federal Courts, including this, the highest Federal Court in the land. This Honorable Court may or may not have otherwise interpreted Florida's Constitution if called upon to do so, but it is not the province of this Court, nor its function, to grant advisory opinions upon random, although interesting, propositions of law. Therefore, under Question No. 1, no substantial Federal question has been raised upon which certiorari could be granted.

In Question No. 2 sought to be raised by Petitioner, his basic contention is that the Supreme Court of Florida, in its Decision of November 7, 1974, conflicted with the Constitution of the United States by failing to apply the Laws of the State of New York governing contracts, and failing to accord a jury trial by refusing to give effect to the substantive defense of usury arising under New York contract law.

A simple reading of the Opinion of the Supreme Court of Florida in question shows clearly that the Court did indeed give full faith and credit to the Laws of New York concerning usury in contracts and did indeed reverse the Lower Courts and remand the cause for a new jury trial, *based upon its construction of New York Law.*

In its Opinion, the Court, as a threshold statement to ruling on the questions involved stated:

> "Therefore, it is necessary to ascertain whether the agreement is usurious under the New York usury statute, since the validity of the agreement is governed by the lex loci contractus."

The Court then went on to discuss and to cite various New York authorities which indicated its opinion that permitting Petitioner to interpose usury as a defense in the Lower Court trial of this cause, and to so instruct the jury thereon, was error. The Court said:

> "The general rule in New York is that a loan is usurious where the lender is entitled to the return of the principal and the full legal rate of interest plus a bonus to be paid upon a contingency over which the borrower has no control. This contingent right to a bonus must be something of value and when added to the maximum interest results in a total interest in excess of the legal rate. Webster vs. Roe, 212 App.Div. 756, 210 N.Y.S.366 (1925); aff'd. 241 N.Y. 570, 150 N.E.559 (N.Y. 1925); Moore vs. Plaza Commercial Corp., 9 App.Div.2d 223, 192 N.Y.S.2d 770 (1959), aff'd. 8 N.Y.2d 813, 202 N.Y.S.2d 321, 168 N.E.2d 390 (N.Y.1960); et seq.
>
> However, an agreement to pay an amount which may be more or less than the legal interest, depending upon a reasonable contingency is not *ipso facto* usurious, because of the possibility that more than the legal interest will be paid. Hartley vs. Eagle Ins. Co., 222 N.Y.178, 118 N.E.622 (1918); In re Bechtold's Estate, 159 Misc.725, 289 N.Y.S.838 (Surr.Ct., Clinton Co., 1936).
>
> Additionally, a loan has been deemed not usurious where the money is in fact advanced for the purpose of a joint venture (Salter vs. Havivi, 30 Misc.2d 251, 215 N.Y.S.2d 913 (Sup.Ct., N.Y. Co., 1961) or where there is *no certainty* that the bonus plus the stipulated interest will exceed the legally allowable rate of interest. Richardson vs. Hughitt, 31 N.Y.55 (1879); Cusick vs. Ifshin, 334 N.Y.S.2d 106, 70 Misc.2d 564, aff'd. 341 N.Y.S.2d 280, (Sup.Ct.App.Term, 1973)." (APP.C)

The Court then went on to indicate its finding that the evidence showed the intent of the parties; i.e., Goodman and Olsen, to participate in a joint venture; that is to carry out a single business enterprise for profit for the purpose of which they combined their money, efforts and skills.

The Court then found the facts of the instant cause to be analogous with those in *Orvis vs. Curtiss,* 157 N.Y.655 (1899).

The Florida Court then pointed out that under the analogous facts situation in *Orvis,* the New York Court held that these facts defined a partnership or joint venture, and that the defense of usury was not applicable. The Court delved further into the New York Law of usury and contract, citing *Cusick vs. Ifshin, supra.* The holding in *Cusick,* the Court indicated, would establish that the agreement in the instant case could not be considered usurious, because the repurchase clause with only the possibility of damage to Olsen if Goodman required repurchase by him, created a contingency, and thus there would be no certainty that an unlawful bonus to Goodman would accrue.

One of the strongest points relied upon by the Florida Supreme Court in reversing and remanding the case for jury trial apparently was the fact that the loan from Goodman to Olsen of $150,000.00 was interest-free. The Court said:

> "Finally, the last factor indicating that the parties anticipated a joint venture when they consummated the agreement is that the loan to Olsen of the $150,000.00 was interest-free; indicating that Goodman intended to derive any and all gain not from his partner (unless the venture possibly failed) but rather from the strength of their investment.
>
> Therefore, under the cited New York authorities, the acceptance of the interposition of the defense of usury and instructions to the jury thereon in this action tried in Florida was error." (APP.C)

It is, of course, obvious from the foregoing that the Supreme Court of Florida, in the case, *sub judice,* did, in fact, apply and construe New York Law on usury and on contracts. That no one has been denied a jury trial is likewise clear, inasmuch as the Supreme Court's decision remands the cause for a jury trial. The Complaint of Petitioner herein is actually its disagreement with the construction of New York Law of contract and of usury, and he is completely begging the question by stating in his Petition that the Florida court did not apply New York Law.

Practically every paragraph of the Decision is replete with language of the Court construing the New York Law in question.

As pointed out, *supra,* it is the construction put upon New York Law by the Florida Supreme Court in the instant case with which Petitioner really disagrees. Nothing could be more clear that in order to create a reviewable Federal question under the constitutional provisions as to full faith and credit and the other constitutional points claimed by the Petitioner herein, the fact that the validity of the Laws of New York is drawn into question and actually interpreted by the Courts of Florida, must be shown and not merely the construction of New York Laws, whether erroneous or not, by the Florida Court. *Johnson vs. New York Life Insurance Co.,* 187 U.S.491, 47 L.Ed.273, 23 S.Ct.194.

In *Glenn vs. Garth,* 147 U.S.360, 37 L.Ed.203, 13 S.Ct.350, the United States Supreme Court, in denying a Writ of Error to the Supreme Court of New York, in an action under a Virginia Statute to enforce the liability of a party who had never subscribed his stock or been a transferee thereof, in fact; because of the presence of his name upon the books of the company without his consent, held that the New York Court did not deny full faith and credit to the Virginia Statute because said Court merely construed the Virginia Statute without questioning its validity. As pointed out in 74 A.L.R.716, in such a situation, even though the New York Court, without denying the validity of the Statute in question, may have construed it erroneously, such a construction does not deny to the Statute or to the Laws involved, the full faith and credit required by the Constitution. Hence, a litigant cannot complain that his rights acquired under the Laws of another State were not recognized or enforced by the Courts of the forum. The Supreme Court said, in *Glenn vs. Garth:*

"If we were to assume jurisdiction of this case, it is evident that the question submitted would be, not whether the decision of the New York court was against a right specially set up and claimed under the Constitution of the United States, or necessarily arising, but whether in that decision error intervened in the construction of the statutes of Virginia. If every time the courts of a state put a construction upon the statutes of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."

A lead case in this jurisdictional area is *Banholzer vs. New York Life Insurance Co.*, 178 U.S.402, 44 L.Ed.1124, 20 S.Ct.972. In *Banholzer*, it was contended that the Supreme Court of Minnesota did not give full faith and credit to a New York Statute involving insurance, but the United States Supreme Court held that the Minnesota Court merely construed the New York Statute; and even granting that its construction was erroneous, full faith and credit were not thereby denied to the New York Statute. The Court said:

> "The Plaintiff, in error, however, assails the conclusions of the court. It asserts the court erred in its construction of the Conway Case, and erred in its independent construction of the New York Statute.

> Granting, arguendo, the correctness of both assertions, the validity of the statute was not denied. Its validity and authority were declared, and its meaning was first sought at a decision of the New York Courts and then confirmed by independent care and construction."

To the same effect; and re-emphasizing the same definitive body of Federal Law, is *Lloyd vs. Matthews*, 155 U.S.222, 39 L.Ed.128, 15 S.Ct.70; and *Allen vs. Allegheny Co.*, 196 U.S.458, 49 L.Ed.551, 25 S.Ct.311.

In the instant cause, the Florida Supreme Court applied the Laws of the State of New York and the decisions of its highest court to the questions involved in the appellate proceeding in that Court, and gave not only full faith and credit to said State's Laws, but applied to its judicial decisions, as well, the principles of comity. Interestingly enough, at no place in his Petition does Petitioner contend that the Florida Supreme Court incorrectly applied the New York Law in its Opinion and in its Decision of November 7, 1974. The Court is not challenged as having been wrong in its application of law; and, therefore, the presumption is that it was correct.

But, as the foregoing exposition of case law indicates, even if the construction applied was erroneous, the validity of the Laws of New York was not challenged, and New York Law was, in fact, applied. Under the circumstances, such as exists herein, therefore, no reviewable Federal question is presented to this Honorable Court to invoke its jurisdiction on certiorari.

CONCLUSION

No grounds for invoking the jurisdiction of the Court to issue a Writ of Certiorari have been properly invoked herein.

In summarizing, the Petition herein incorrectly seeks certiorari from an Order and Decision of the Supreme Court of Florida of November 7, 1974, which was not a Final Judgment, and which remanded the cause to the Lower Court for jury trial.

The conflicts now claimed by the Petitioner with the Constitution of the United States were never raised, in any stage of the proceedings in Florida, including the Petition for Rehearing before the Florida Supreme Court, denied on January 29, 1975. They are raised now for the first time, in this Petition.

The Petition is based on matters, *de hors* the record, and thus should not be considered, being replete with irrelevant, immaterial and scandalous matter, and failing, in all respects, to comply with the applicable rules of the Supreme Court of the United States for matters required to be presented on Petition for Certiorari.

No substantial question is raised by the Petition, as is evidenced by the Petition itself.

In the first Question Presented, Petitioner has disagreed with the decision of the Supreme Court of Florida in assuming jurisdiction in Florida of the Respondent's Petition for Certiorari under the appropriate provision of the Florida Constitution. The construction of the States own Constitution by its Supreme Court is

uniquely within the province of that Court, and thus no substantial Federal ground is presented for invoking certiorari as to that point.

The final Question Presented by Petitioner claims a failure of the Supreme Court of Florida to give full faith and credit to the Laws of New York on usury and contract, resulting in further constitutional deprivations. The opinion of the Court itself shows clearly that full faith and credit to the Laws of New York was given by the Florida Court, and that the Florida Supreme Court merely construed the applicable New York Law in a way unfavorable to, and disapproved by, the Petitioner. The Petitioner has never challenged said construction of New York usury law by the Supreme Court of Florida as erroneous.

In any event, whether correct or whether erroneous, New York Law was applied to the cause at bar, and the construction thereof by the Florida Supreme Court presents no grounds for invoking the jurisdiction of this Court for certiorari.

For the foregoing reasons, we respectfully urge that this Court deny certiorari and dismiss the Petition therefor, forthwith.

Respectfully submitted,

LAW OFFICES OF
LEO GREENFIELD, P.A.
Attorney for Respondent
1680 N.E. 135th Street
North Miami, Florida 33181

APPENDIX

APPENDIX "A"

"Dear Saul,

As per our joint venture, it is agreed that you shall put up the sum of $300,000.00 of which sum I am borrowing $150,000.00. Said funds shall be used to purchase 50,000 shares of Omega Equities, Incorporated, common stock, under an investment letter. You shall own 25,000 of these shares, and I shall own the other 25,000, which I pledge to you as collateral on the above loan.

I agree to repay the above $150,000.00 to you by May 31, 1969. I further agree to purchase from you, in the event you desire to sell to me, your 25,000 shares of the above stock at a price of $10.00 per share. Said purchase to take place between October 1, 1969, and December 21, 1969. In the event, I fail to pay the purchase price of said stock within ten days from tender of same, you may sell said shares, and I shall be liable to you for any sums less than $10.00 per share.

I agree not to sell any of my shares prior to December 31, 1969, without your prior written consent unless all my obligations to you in this joint venture have been satisfied.

I agree to take out a life insurance policy in the sum of $400,000.00 made payable to you, said policy to stay in good standing until the conclusion of this agreement. I shall pay the premiums on said policy, and you shall be the owner of same.

It is understood that said shares of Omega stock shall be held jointly by us as Trustees, and that said stock shall be 50,000 shares of a 100,000 share certificate. The other 50,000 shares shall be held by us as Trustees until

registration, at which time they shall be registered in the respective owners' names. At time of registration, the 50,000 owned by us shall be registered, 25,000 shares in your name, and in the event I have an obligation still due and owing to you, 25,000 shares in our joint names, otherwise in my name.

Very truly yours,

Richard H. Olsen,
Palm Bay Club,
Miami, Florida 33135."

APPENDIX "B"

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1974
MONDAY, JUNE 24, 1974

SAUL GOODMAN,	**	
Petitioner,	**	
vs.	**	WRIT OF CERTIORARI
RICHARD H. OLSEN,	**	CASE NO. 45,356
Respondent.	**	

The Petition herein for a Writ of Certiorari to the District Court of Appeal, Third District of Florida, is granted and the cause is hereby set down for oral argument at 9:30 o'clock a.m. Friday, September 13, 1974.

A maximum of 15 minutes to the side is allowed but counsel is expected to use only so much of that time as is necessary.

Either side may waive oral argument. If both sides waive oral argument the case will be promptly assigned for decision and the cause expedited.

The Court has tentatively accepted jurisdiction of this case; however, the parties should be prepared to argue the jurisdictional issue should the question be raised by the Court.

The time for filing briefs on the merits is set forth in Rule 4.5(c)(6), F.A.R.

ADKINS, C.J., ROBERTS, McCAIN, DEKLE and OVERTON, JJ., concur

A True Copy
TEST:

/s/Sid J. White
Sid J. White
Clerk Supreme Court.
By: Sara Gainey, D.C.

sg
cc: Honorable William P. Carter, Clerk
Law Offices of Leo Greenfield
Messrs. Prunty, Ross, DeLoach & Olsen

APPENDIX "C"

Not final until time expires to file Rehearing Petition and, if filed, determined.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1974

SAUL GOODMAN, *Petitioner,* *v.* RICHARD H. OLSEN, *Respondent.*	:	CASE NO. 45,356 DCA CASE NO. 72-798

Opinion files November 7, 1974
Writ of Certiorari to the District Court of Appeal, Third District
Leo Greenfield of the Law Offices of Leo Greenfield; and Frank Ragano, for Petitioner
John W. Prunty of Prunty, Ross, DeLoach and Olsen, for Respondent

McCAIN, J.

This cause is before the Court on a petition for writ of certiorari. We have jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution.

The respondent, Olsen, an attorney from Florida, prepared and executed an agreement in New York in which he stated that as per a "joint venture" the petitioner, Goodman, was to advance the sum of $300,000 for the purchase of 50,000 shares of stock in Omega Equities, Incorporated, $150,000 of which was characterized as a loan to Olsen. Under the terms of the agreement, Goodman was to own 25,000 shares and Olsen was to own the other 25,000 shares which he pledges as collateral on the loan.

Olsen agreed to repay the $150,000 by a stipulated date, and further agreed to purchase the petitioner's 25,000 shares at $10.00 per share in the event that Goodman desired to sell on or before a stipulated date. In addition, Olsen agreed that in the event that he failed to pay the stipulated purchase price, he would be liable for any sum up to $10.00 per share upon the sale of Goodman's shares.

After the execution of this agreement by Olsen, Goodman gave Olsen a check in the amount of $300,000 and Olsen purchased the stock. Olsen had repaid approximately $60,000 of the $150,000 when this action was commenced in Dade County, Florida.

Goodman filed suit seeking not only the $90,000 balance remaining on the loan but further sought damages for breach of contract for failing to buy back the 25,000 shares of stock at $10.00 per share. Olsen defended by alleging that he had refused to buy back the stock only after he was advised that the contract was usurious.

The jury returned a verdict in favor of Olsen and upon appeal to the District Court of Appeal, Third District, that judgment was affirmed per curiam.

Before determining whether any error has been committed, it is first necessary to determine whether the Florida or New York usury statute is applicable. Then the agreement must be scrutinized to determine, under that choice of law, whether the agreement is usurious, and finally, if necessary, what remedies are applicable.

As to the first question, concerning the choice of law, this Court in Wingold v. Horowitz, 292 So. 2d 585, 586 (1974), citing from Brown v. Case, 80 Fla. 703, 86 So. 684 (1920), stated:

> "The rule thus laid down by the Supreme Court of the United States was recognized by the Supreme Court of Florida as early as 1856.
>
> "[1] 'The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the lex loci of the country where the contracts are made or are to be performed; but the remedies are to be governed by the lex fori.' Perry V. Lewis, 6 Fla. 555."

Therefore, it is necessary to ascertain whether the agreement is usurious under the New York usury statute, since the validity of the agreement is governed by the lex loci contractus.

The general rule in New York is that a loan is usurious where the lender is entitled to the return of the principal and the full legal rate of interest plus a bonus to be paid upon a contingency over which the borrower has no control. This contingent right to a bonus must be something of value and when added to the maximum interest results in a total interest in excess of the legal rate. Webster v. Roe, 212 App. Div 756, 210 N.Y.S. 366 (1925); aff'd. 241 N.Y. 570, 150 N.E. 559 (N.Y. 1925); Moore v. Plaza Commercial Corp., 9 App. Div.2d 223, 192 N.Y.S.2d 770 (1959), aff'd. 8 N.Y.2d 813, 202 N.Y.S.2d 321, 168 N.E.2d 390 (N.Y. 1960); et seq.

However, an agreement to pay an amount which may be more or less than the legal interest, depending

upon a reasonable contingency, is not *ipso facto* usurious, because of the possibility that more than the legal interest will be paid. Hartley v. Eagle Ins. Co., 222 N.Y. 178, 118 N.E. 622 (1918); In re Bechtoldt's Estate, 159 Misc. 725, 289 N.Y.S. 838 (Surr.Ct., Clinton Co., 1936).

Additionally, a loan has been deemed not usurious where the money is in fact advanced for the purpose of a joint venture (Salter v. Havivi, 30 Misc.2d 251, 215 N.Y.S.2d 913 (Sup.Ct., N.Y. Co., 1961) or where there is *no certainty* that the bonus plus the stipulated interest will exceed the legally allowable rate of interest. Richardson v. Hughitt, 31 N.Y. 55 (1879); Cusick v. Ifshin, 334 N.Y.S.2d 106. 70 Misc. 2d 564, aff'd 341 N.Y.S.2d 280, (Sup.Ct.App. Term, 1973).

Under the terms of the written agreement, sub judice, the statement that the agreement is a "joint venture" is not absolutely determinative of the issue, although this language contained in the agreement is an important factor to be considered in the determination of its character. The answer lies in the intent of the parties rather than the choice of language.

Notwithstanding, it is clear from the intent of the parties as reflected in their actions after the consummation of the agreement, that the parties intended a "joint venture," that is: to carry out a single business enterprise for profit, for which purpose they combined their money, efforts and skills. The record clearly shows that Goodman was or had been a banker, had money, was interested in profitable investments and had been previously associated with Olsen, who had expertise in business administration and corporate acquisitions. Additionally, Olsen initially brought to the attention of Goodman the possibility of acquisition of the Omega stock for a profitable investment.

The facts of this case are analogous with those in Orvis v. Curtiss, 157 N.Y. 657 (1899), *rev'g* 12 Misc. Rep. 434 (Dist.Ct. N.Y. City 1895). In the *Orvis* case, H. comes to S. and represents: The business of trading in old, rare musical instruments is a very lucrative one but it takes a lot of capital which I do not have. You have the money and I have the know-how, setup and contacts. I am asking you to come into business with me. I guarantee that you won't lose anything. You will first be repaid every cent you advance with 6% interest, and when the last item of our collection is sold, after first deducting the legitimate expenses, we will split the net profits.

Under this fact situation, the Court in *Orvis* held that these facts defined a partnership or joint venture and that the defense of usury was not applicable.

The only variance in the case at bar is that in addition to the *Orvis* minimum factors, Olsen made additional guarantees in order to induce Goodman to consummate the agreement.

Albeit, even assuming arguendo that the agreement under review was not a joint venture under New York law, the fact that the purchase-back clause, with only the possibility of damage to Olsen, created a contingency. As such, there was no certainty that the bonus to Goodman would accrue. For example, if Olsen had repaid his $150,000 and the stock increased in value, then Olsen would not have been indebted to Goodman for anything. Indeed, Olsen would have been "home free and ahead of the game." Hence the agreement can not within reason be considered usurious. See: *Cusick v. Ifshin, supra.*

Finally, the last factor indicating that the parties anticipated a joint venture when they consummated the agreement is that the loan to Olsen of the $150,000

was interest free; indicating that Goodman intended to derive any and all gain not from his partner (unless the venture possibly failed) but rather from the strength of their investment.

Therefore, under the cited New York authorities, the acceptance of the interposition of the defense of usury and instructions to the jury thereon in this action tried in Florida was error.

Since the defense of usury in the trial of this cause went to the heart of the action, and since the determination of the issues and liabilities of the parties are primarily questions of fact (with the assumption there are or may be defenses other than usury to be interposed), the cause is hereby reversed and remanded for a new trial.

It is so ordered.

ADKINS, C.J., ROBERTS, ERVIN and BOYD, JJ., Concur OVERTON, J., Dissents with opinion

Overton, J., dissenting.

In my opinion, jurisdiction has been improperly granted. There is no conflict. I would discharge the writ and affirm the Circuit Court and the Third District Court of Appeal.

APPENDIX "D"

IN THE SUPREME COURT OF FLORIDA
CASE NO. 45,356
DCA CASE NO. 72-798

SAUL GOODMAN, *Petitioner,*	)	
vs.	)	PETITION FOR RE-HEARING
RICHARD H. OLSEN, *Respondent.*	)	

Respondent, RICHARD H. OLSEN, moves this Court to withdraw and set aside the Opinion filed November 7, 1974 and to grant a re-hearing in the above cause upon the following grounds: [For ease of reference a copy of the Court's Opinion is attached with numbered paragraphs which are referred to herein.]

1. This Court attempts to take jurisdiction on the basis of conflict under Article V, Section 3(b)(3) of the Constitution of the State of Florida utilizing as a basis for conflict two Florida cases cited in the Petition, dealing completely with violations of professional ethics by lawyers under the Florida Integration Rule,[1] but at the same time this Court has in its Opinion (Page 2, Paragraphs 7 and 8) readily admitted that the laws of

[1] *State of Florida ex. Rel., The Florida Bar v. Delves*, 160 So. 2d 114; *Florida Bar v. O. E. Pitts*, 219 So. 2d 427.

the State of New York, and the decisional interpretations thereof, must control with reference to the construction of the contract herein involved. Thus this Court's Opinion makes it obvious that no conflict exists.

2. The Court has failed to recognize in its Opinion (Page 1, Paragraph 2) that the Goodman-Olsen agreement was not "characterized" as a loan by Goodman to Olsen, but, in fact, spelled out specifically that the sum of $150,000.00 was a direct loan, and further set forth specifically the terms of repayment and the interest profit which Goodman was to receive.

3. The Court on Page 2, Paragraph 4 of the Opinion has wholly failed to recognize that the repayment on the loan was $50,000.00 and not $60,000.00. The sum of $10,000.00 having been demanded as additional interest or a rebate by the lender, Goodman, prior to permitting the check for the total amount given to Olsen to be cleared.

4. The Court indicated on Page 2, Paragraph 5 of its Opinion, a failure to clearly examine the record which shows that Goodman filed a suit not for the $90,000.00 balance of the loan, but upon a claim for $150,000.00. Moreover, the record further supports the fact that after the payment of $50,000.00 was made Goodman still sought to claim the balance of the debt to be $100,000.00, thus again verifying that the $10,-000.00 initially demanded by Goodman was a payment of interest and not principal. Furthermore, the record clearly shows that Olsen's defense had two aspects, (1) the initial payment of $10,000.00, extracted by Goodman, which was not part of the agreement and constituted usury and (2) the buy back portion of the agreement demanded by Goodman which likewise constituted a usurious bonus to Goodman.

5. While the Court in its Opinion on Page 3, Paragraph 9 sets forth the proper general rule of the law of New York on the subject of usury, the Court subsequently misapplies completely this rule of law by interpreting the buy back provision of the agreement to be a contingency over which the borrower has control when, in fact, the borrower, Olsen, had no control over the contingency and was at the mercy of the lender, Goodman. The only contingency aspect of the transaction was that Goodman might not demand the repurchase of the stock, but clearly he had the power to make such a demand and this contingency was completely within his control, thus usurious, and not within the control of Olsen. This usurious provision of the contract has been completely by-passed by this Court.

6. The Court on Page 3, Paragraphs 9 and 10 of the Opinion cites cases involving general law of New York which are completely dissimilar and involve factual situations which are far removed from the factual situation in the case at bar and have no reasonable application to the issue of contingency or joint venture.

7. The Court in the Opinion on Page 3, Paragraph 12 agrees with the settled decisional law that the language contained in the agreement is not controlling, but that the answer lies in the intent of the parties, thereby clearly indicating a holding that such a factual situation is for the determination of a jury and not the Court. Although, the jury made a full determination on this factual situation, to the effect that usury was present, this Court has taken these issues of fact completely away from the jury and has undertaken to become a trial forum for the determination of facts.

8. This Court attempts on Page 4, Paragraphs 14 and 15 of the Opinion to utilize as support for its position the case of *Orvis v. Curtiss*, 157 N.Y. 657; 52

NE 690 (CA NY 1899) and has quoted liberally therefrom. However, it is interesting to find that a careful reading of the *Orvis* case fails to disclose the quotation cited. Nor does the case refer to musical instruments, nor are musical instruments mentioned anywhere in the case. Apparently the factual situation attributed to the *Orvis* case was obtained in part from the case of *Salter v. Havivi*, 215 N.Y.S. 2d 913 (Sup.Ct. NYCo. 1961). A case which again fails to reflect the factual situation of the case at bar. In both *Orvis* and *Salter* there was no loan, whereas in the present case the agreement itself specifically refers to a loan and the terms of repayment. In quoting from the *Salter* case the Court has failed to use both of the examples set forth on Page 916 of the reported case. Example number 1 which is determined to be usurious is the one which obviously fits the case at bar and which was omitted in the preparation of the Court's Opinion. It reads as follows:

> "Case No. 1. H. comes to S. and says to him: "I am thinking of going into the business of trading in old, rare musical instruments but this requires a lot of capital which I do not have. You have the money. I would like you to lend it to me." S. answers: "I shall lend you the money on the condition that you will repay the loan with 6% interest and if you make a profit in your business, you will give me 50% of it after first deducting all legitimate expenses"."

[A copy of the *Salter* case is attached hereto for reference.]

9. This Court has completely ignored the issue of usury consisting of the demand by Petitioner, Goodman, and the payment to him of $10,000.00 at the inception of the transaction. After Petitioner, Goodman, had given Respondent, Olsen, his check for the stock and the check had been paid to the company for the purchase of the stock, Petitioner, Goodman, advised Respondent, Olsen, he had stopped payment on the check and would only let it clear collection if he were paid the $10,000.00. Although this matter was argued at length by the Respondent, Olsen, and no reply was ever made thereto by the Petitioner, Goodman, it still remains a completely undecided issue as far as the Opinion of this Court is concerned. It can only be concluded that the failure of the Court to respond to this issue is indicative that this Court has not fully reviewed all of the facts and issues put before the Court. On this point the Court has chosen to completely disregard the case of *Breunich v. Wesselman*, 100 N.Y. 609, 2 NW 385, which case fits precisely the factual situation of the case at bar and is determinative of the issues. [A copy of the *Breunich* case is attached for reference].

10. This Court by its Opinion on Page 5, Paragraphs 17, 18 and 19 seeks to deprive the Respondent of the utilization of the defense of usury in a retrial of this cause. The issue of usury having already been determined by a jury, the Respondent is entitled, if this Court views some procedural errors to have occurred, to at least to have that issue re-tried by the jury. In refusing this right this Court is casting itself in the role of trial judge and trial jury and has proceeded to erroneous conclusions in its attempted determination of the facts and the applicable law.

WHEREFORE, the Respondent respectfully urges this Court to grant a re-hearing in this cause in that the

present Opinion of this Court improperly grants jurisdiction and further is contrary to the facts and the law applicable thereto and fails to pass upon essential issues presented to the Court.

Respectfully submitted,

PRUNTY ROSS DeLOACH & OLSEN
Attorneys for Respondent
837 City National Bank Bldg.
Miami, Florida 33130

By/s/ John W. Prunty
JOHN W. PRUNTY

I HEREBY CERTIFY that a true copy of the foregoing Petition for Re-Hearing was mailed to Frank Ragano, Esq., 28 W. Flagler Street, Suite 400, Miami, Florida, 33130 and to Law Offices of Leo Greenfield, P.A., 1680 NE 135th Street, Suite 200 West, North Miami, Florida, 33161 Attorneys for Petitioner, on the 9th day of December, 1974.

/s/ John W. Prunty
Attorney

APPENDIX "E"

AFFIDAVIT

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

(THE AFFIDAVIT OF FRANK RAGANO, *DE HORS* THE RECORD, IN RESPONSE AND IN CLARIFICATION OF THE AFFIDAVIT OF MARC H. GLICK

BEFORE ME, the undersigned authority, on this date, personally appeared FRANK RAGANO, who, upon being first duly sworn, under oath, deposes and says:

1. I am FRANK RAGANO, a Miami and Tampa attorney, referred to by Mr. Marc H. Glick in his Affidavit offered in personal support of the Petitioner's cause, and printed as Appendix "G" to Petitioner's Petition in the case of *Olsen vs. Goodman.*

2. In the interests of justice, and to clarify certain scurrilous and scandalous allegations made by Mr. Glick in his Affidavit, I am presenting herein additional clarifying facts in order that the true picture of the matter may be presented to this Honorable Court.

A. That during the period of time that the Impeachment Committee described in Glick's Affidavit was conducting hearings, I was subpoenaed by Marc H. Glick, and appeared before him at his office in Tallahassee, Florida, at which time he took my deposition. That I was questioned at length in regard to the cases of *Lombardosi vs. Wainwright,* Case No. 41,0001; and *Goodman vs. Olsen,* Case No. 43,168. It is to be noted that the Defendant, Lombardosi, received a twenty (20) year prison sentence, which is presently being served, and which conviction was affirmed by the

Supreme Court of Florida, with Justice McCain participating. That I testified under oath that I met Justice David McCain for the first time in the Supreme Court Building, approximately one year subsequent to the time of the alleged incident that Marc H. Glick describes in his Affidavit, in regard to the Lombardosi case.

I further testified that I had not, at any time, under any circumstances, spoken to Justice McCain, or any of the other six (6) Supreme Court Justices of Florida regarding the *Goodman vs. Olsen* case, or the *Lombardosi* case. In addition thereto, I testified that during the period of time that Justice McCain was on the Bench of the Supreme Court of Florida, I had three (3) criminal cases before said Court, and that certiorari was denied, in each one of those cases, and that the Defendants therein subsequently began serving prison terms of life imprisonment, twenty (20) years imprisonment, and twelve (12) years imprisonment. That Affiant is primarily a defense lawyer in criminal cases, and that during the period of time that Justice McCain was on the Bench of the Supreme Court of Florida, this Affiant lost all three (3) criminal cases that he had before the Supreme Court of Florida.

B. That upon the completion of the taking of my deposition by Marc H. Glick, I volunteered to go before the Select House Impeachment Committee, and was informed by Marc H. Glick that he would not require my appearance, and he excused me.

C. At no time have I ever discussed the *Goodman vs. Olsen* case with Justice McCain, or any other Member of the Supreme Court of Florida, as I testified under oath at the above described time and place.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

/s/ Frank Ragano
FRANK RAGANO

Sworn to and subscribed before
me this 18th day of July, 1975.

/s/ Rose E. Fink
Notary Public, State of Florida
at Large

My Commission expires:
December 5, 1977